Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1604

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SANFORD J. BERGER, et al.,

Petitioners,

v.

CUYAHOGA COUNTY BAR ASSOCIATION, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a local bar association, its attorney grievance committee and members of that committee are entitled to absolute and state action immunity from suit for money damages when the attorney grievance committee is certified by the relevant state supreme court to investigate and prosecute disciplinary complaints against attorneys and the disciplinary enforcement activities of the committee that are the subject of the suit were authorized and required under rules promulgated by the state supreme court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 8

CONCLUSION 15

APPENDIX A1

TABLE OF AUTHORITIES

Page

Cases

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 13

Burns v. Reed, ____ U.S. ____, 111 S. Ct. 1934 (1991) 13

Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) 11

Cuyahoga County Bar Ass'n v. Berger, 64 Ohio St. 3d 454, 597 N.E.2d 81 (1992), cert. denied, _____ U.S. _____, 113 S. Ct. 1049 (1993) 7

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 9

Forrester v. White, 484 U.S. 219 (1988) 10

Ginger v. Circuit Court for Wayne County, 372 F.2d 621 (6th Cir. 1967) 11

Hefner v. Alexander, 779 F.2d 277 (5th Cir. 1985) 13

Hoover v. Ronwin, 466 U.S. 558 (1984) 13

TABLE OF AUTHORITIES (cont'd.)

Page

Cases

Howell v. State Bar of Texas, 710 F.2d 1075 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984) 9

Imbler v. Pachtman, 424 U.S. 409 (1976) 10, 13

Kissell v. Breskow, 579 F.2d 425 (7th Cir. 1978) 11

MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) 9

Parker v. Brown, 317 U.S. 341 (1943) 13

Pierson v. Ray, 886 U.S. 547 (1967) 10

Powell v. McCormack, 395 U.S. 486 (1969) 9

Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) 11, 12

Sparks v. Character and Fitness Comm. of Kentucky, 818 F.2d 541 (6th Cir.), *vacated and remanded*, 484 U.S. 1022 (1987), *aff'd on remand*, 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) 10, 11

TABLE OF AUTHORITIES (cont'd.)

Page

Cases

Stern v. Nix, 840 F.2d 208 (3d Cir.), *cert. denied*, 488 U.S. 826 (1988) 9

Stump v. Sparkman, 435 U.S. 349 (1978) 10

Younger v. Harris, 401 U.S. 37 (1971) 6

Statutes and Rules

Ohio Const., art. IV, § 2(B)(1)(g) 12, 14

Rule V, Supreme Court Rules for the Government of the Bar of Ohio . . . . . Passim

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 983 F.2d 718. The opinion of the district court (Pet. App. A12-A31) is reported at 775 F. Supp. 1096.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1993. A timely petition for rehearing with suggestion for rehearing in banc was denied on March 12, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2(B)(1)(g) of the Ohio Constitution provides in pertinent part:

> The supreme court shall have original jurisdiction in the . . . [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

Ohio Const. art. IV, § 2(B)(1)(g). The full text of Section 2 of Article IV is set forth at Resp. App., *infra*, A1-A3.

Respondents[1] also rely upon various sections of Rule V of the Supreme Court Rules for the Government

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[1] This brief in opposition is filed solely on behalf of respondents The Cuyahoga County Bar Association, the Certified Grievance Committee of the Cuyahoga County Bar Association, Richard S. Koblentz and Laurence A. Turbow.

of the Bar of Ohio. Pertinent portions of the text of Rule V are set forth at Resp. App., *infra*, A4-A40.[2]

STATEMENT OF THE CASE

On March 7, 1989, a complaint was filed with respondent The Cuyahoga County Bar Association (the "Bar Association") by Daniel Gurish against petitioner Sanford J. Berger, an attorney admitted to practice in the State of Ohio. The complaint concerned the fee arrangement under which Berger and petitioner Robert M. Fertel had represented Gurish in a civil rights action litigated in federal district court.

Gurish's complaint was ultimately referred to the Certified Grievance Committee of the Bar Association (the "Grievance Committee"), also a respondent herein. The Grievance Committee is certified by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board of Commissioners") pursuant to Rule V(6)(c) of the Supreme Court Rules for the Government of the Bar of Ohio (hereafter the "Supreme Court Rules"). *See* Resp. App. at A18-A19. This certification authorizes the Grievance Committee to

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[2] Omitted are Sections 23 through 30 of Rule V which address procedures following entry of an order by the Supreme Court of Ohio imposing certain disciplinary sanctions. The text of Rule V was substantially revised and reorganized by amendment effective July 1, 1992. The text reproduced at Resp. App. A4-A40 reflects the Rule prior to such amendment. *See* Ohio Rules of Court, State, 1992, 1421-48 (West 1991). Citations to specific sections of the Rule contained in this brief are to the Rule as effective prior to such amendment.

review and prosecute complaints and grievances alleging misconduct on the part of judges and attorneys as the initial step in the disciplinary procedures established under the Supreme Court Rules. The Grievance Committee is composed of members of the Bar Association and operates under the Board of Commissioners' Rules for Certified Grievance Committees.

Pursuant to Supreme Court Rule V(5)(a), the Grievance Committee held an Investigative Hearing on November 20, 1989 to determine whether a formal disciplinary complaint should be filed against Berger with the Board of Commissioners.[3] Based on the evidence adduced at the hearing, the Grievance Committee found probable cause that Berger's conduct regarding the fee arrangement with Gurish violated the Code of Professional Responsibility adopted by the Supreme Court of Ohio (hereafter the "Code") and directed that a formal complaint be filed with the Board of Commissioners against Berger.[4] Further, based on the testimony

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[3] The Grievance Committee is required to investigate any matter filed with it to determine whether probable cause exists for the filing of a formal complaint with the Board of Commissioners. Supreme Court Rule V(5)(a). *See* Resp. App. at A12-A13. An attorney who is the subject of a grievance must be given the opportunity to respond to the allegations of misconduct before a formal complaint is filed. *Id. See* Resp. App. at A14. The Grievance Committee has adopted the procedure of holding "investigative hearings" in order to fulfill these requirements.

[4] Under Supreme Court Rule V(6)(a), any violation of the Code constitutes misconduct for disciplinary purposes. *See* Resp. App. at

presented at the November 20 hearing, an initial complaint was filed with the Grievance Committee against Fertel by the Bar Association. An Investigative Hearing regarding that complaint was held on February 8, 1990, at which probable cause was found to support the filing and prosecution of a formal complaint against Fertel.

On January 23, 1990, petitioners filed with the United States District Court for the Northern District of Ohio a Complaint for Declaratory, Injunctive and

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A18. A finding of probable cause by a certified grievance committee is considered preliminary under the Supreme Court Rules; upon making such a finding, the Grievance Committee is required to forward to the Board of Commissioners a summary of its findings together with a copy of a formal complaint. Supreme Court Rule V(10)(b)(i). *See* Resp. App. at A23. This formal complaint is drafted by the Grievance Committee and is prosecuted in its name as Relator. Supreme Court Rule V(11). *See* Resp. App. at A24-A25. Upon receipt of a certified grievance committee's complaint, the Board of Commissioners refers the complaint to a probable cause panel for an independent determination whether probable cause exists for the filing of the formal complaint. Supreme Court Rule V10(b)(i). *See* Resp. App. at A23. If the panel finds that probable cause exists, it then certifies the formal complaint to the Board of Commissioners. *Id.* The respondent attorney then has an opportunity to file an answer to the formal complaint. Supreme Court Rule V(12)(a). *See* Resp. App. at A25-A26. A hearing panel of three commissioners is appointed and a formal adjudicatory hearing is held. Supreme Court Rule V(13)(A). *See* Resp. App. at A27. The hearing panel's findings and recommendations are then reviewed by the entire Board of Commissioners. Supreme Court Rule V(17). *See* Resp. App. at A30. If the Board of Commissioners upholds a finding of misconduct and determines that disciplinary action is merited, then the matter is certified to the Supreme Court of Ohio for final determination. Supreme Court Rules V(18) and V(22)(a). *See* Resp. App. at A30 and A32.

Monetary Relief and Request for Temporary Restraining Order ("Petitioners' Complaint"), alleging that the disciplinary proceedings that had been initiated against them were constitutionally and jurisdictionally deficient. Petitioners' request for a temporary restraining order prohibiting any further prosecution of the disciplinary charges was denied on February 1, 1990.

The Bar Association, the Grievance Committee, Richard S. Koblentz and Laurence A. Turbow (collectively, the "Bar Defendants")[5] filed their motion to dismiss on March 5, 1990, seeking dismissal of Petitioners' Complaint on the grounds that: (i) the doctrine of federal abstention articulated in *Younger v. Harris*, 401 U.S. 37 (1971), mandates rejection of petitioners' requests for injunctive and declaratory relief; (ii) the doctrines of judicial and prosecutorial immunity prevent petitioners from obtaining monetary relief against the Bar Defendants under 42 U.S.C. § 1983 ("Section 1983"); and (iii) the doctrine of state action immunity prohibits petitioners from maintaining a federal antitrust action against the Bar Defendants. The Supreme Court of Ohio, the Board of Commissioners, and J. Warren Bettis, Disciplinary Counsel of the Supreme Court of Ohio, were

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[5] Koblentz was chairman of the Grievance Committee at the time of the Investigatory Hearings. Turbow was a member of the Grievance Committee and had been assigned as the "investigator" responsible for initial review of the disciplinary complaints against petitioners pursuant to the Board of Commissioners' Rules for Certified Grievance Committees. Petitioners' Complaint is devoid of any factual allegations regarding the conduct of Koblentz or Turbow other than their participation in the Investigative Hearings.

also named as defendants in Petitioners' Complaint and filed their own motion to dismiss on March 6, 1990.

The district court issued its decision granting the motions to dismiss on September 19, 1991, holding, in relevant part, that *Younger* and its progeny require dismissal of petitioners' claims for injunctive and declaratory relief and that the state action doctrine bars petitioners' antitrust claim. *See* Pet. App. A12-A31. On October 18, 1991, the district court denied petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment, finding specifically that the Bar Defendants possess absolute immunity from damage liability with respect to their actions in initiating and prosecuting the disciplinary proceedings against petitioners. *See* Pet. App. A32-A41. Petitioners filed a timely appeal with the United States Court of Appeals for the Sixth Circuit.

Meanwhile, the state disciplinary proceedings against petitioners continued pursuant to the procedures set forth in the Supreme Court Rules. *See, supra*, pp. 4-5 at fn. 4. Following an adjudicatory hearing on the Grievance Committee's complaint, the Board of Commissioners adopted the hearing panel's finding that petitioners had violated various provisions of the Code and the Supreme Court Rules and recommended that they be suspended for one year from the practice of law in the State of Ohio. On September 2, 1992, the Supreme Court of Ohio issued its decision concurring in the findings and recommendations of the Board of Commissioners and entered judgment suspending petitioners from the practice of law for one year. *Cuyahoga County Bar Ass'n v. Berger*, 64 Ohio St. 3d 454, 597 N.E.2d 81 (1992) (per curiam). This Court denied petitioners' Petition for a Writ of

Certiorari to the Supreme Court of Ohio, No. 92-887, on January 19, 1993. *Berger v. Cuyahoga County Bar Ass'n*, ___ U.S. ___, 113 S.Ct. 1049 (1993).

On January 11, 1993, the court of appeals issued its opinion affirming in all respects the decision of the district court dismissing Petitioners' Complaint. Recognizing that the prosecutorial role of the Grievance Committee in the attorney disciplinary process is defined and controlled by the Supreme Court of Ohio, the court concluded that the Bar Defendants possessed absolute immunity from liability for their actions in prosecuting the disciplinary complaints against petitioners under the doctrines of judicial and state action immunity. *See* Pet. App. A5-A7. Further, the court found not only that the district court was required to abstain from exercising its equitable powers under the *Younger* doctrine, but that petitioners' requests for injunctive and declaratory relief had been rendered moot by the intervening decision of the Supreme Court of Ohio. *See* Pet. App. A7-A11. Petitioners' subsequent request for rehearing with suggestion for rehearing in banc was denied.

ARGUMENT

Petitioners have presented to the Court a laundry list of "questions" for review, the majority of which address the merits of their assorted claims regarding the alleged constitutional and jurisdictional infirmity of the state disciplinary proceedings. The dismissal of Petitioners' Complaint was premised solely on the affirmative defenses asserted by respondents. Despite petitioners' protestations to the contrary, issues related to the merits

of their claims were not before the court of appeals, nor may they properly be raised on review of that court's decision.

Moreover, petitioners' request for injunctive and declaratory relief from the state disciplinary proceedings are now moot since, as the court of appeals noted, "[n]othing remains to be enjoined or declared improper." *See* Pet. App. at A11. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The issuance of the disciplinary decision by the Ohio Supreme Court and this Court's subsequent denial of the petition for writ of certiorari with respect to that decision concluded the state disciplinary proceedings and terminated petitioners' interest in obtaining the requested equitable relief.[6]

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[6] Petitioners apparently believe that the court of appeals possesses the authority to review and enjoin implementation of the Ohio Supreme Court's decision. It is well-settled that the lower federal courts "do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983). Petitioners could only obtain review of the Ohio Supreme Court's decision from this Court on petition for writ of certiorari. *Id.* at 484 n. 16, quoting *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969). *See also Stern v. Nix*, 840 F.2d 208, 212-13 (3d Cir.), *cert. denied*, 488 U.S. 826 (1988); *Howell v. State Bar of Texas*, 710 F.2d 1075, 1076-77 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). The Court's denial of such petition, in which petitioners presented "questions" virtually identical to those they now raise, forecloses their constitutional and jurisdictional challenge to the state disciplinary proceedings. *See Berger, et al., v. Cuyahoga County Bar Ass'n*, No. 92-

Despite petitioners' obfuscatory tactics, the only justiciable question presented for review is whether the Bar Defendants enjoy immunity from suit for money damages for their actions in undertaking the prosecution of the disciplinary complaints against petitioners. Petitioners have failed to offer any cognizable reason why this Court should review the court of appeals' holding that the Bar Defendants enjoy such immunity with respect to petitioners' civil rights and antitrust claims.

Absolute immunity from damage liability for judicial and prosecutorial acts is well-established. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 886 U.S. 547 (1967). As petitioners concede, an individual's entitlement to immunity is based on the nature of the actions in question and is not restricted to a particular class of offices or actors. "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988) (emphasis in original). Thus, "[p]ublic policy requires 'absolute immunity . . . for all persons - governmental or otherwise - who [are] integral parts of the judicial process.' " *Sparks v. Character and Fitness Comm. of Kentucky*, 818 F.2d 541, 543 (6th Cir. 1987) ("*Sparks I*"), *vacated and remanded*, 484 U.S. 1022, *aff'd on remand*, 859 F.2d 428 (6th Cir. 1988) ("*Sparks II*"), *cert. denied*, 489 U.S. 1011 (1989).

887, Petition for a Writ of Certiorari to the Supreme Court of Ohio at pp. i-vi.

The court of appeals found that the Bar Defendants are entitled to absolute immunity in the instant case "because they acted as arms of the Supreme Court of Ohio in performing a function for which the court and its justices are immune." *See* Pet. App. at A6. This holding is in complete accord with the Court's functional approach to absolute immunity. Further, it is consistent with prior decisions recognizing that those persons, including bar associations and their members, who participate at the behest of a state supreme court in inherently judicial functions are entitled to absolute immunity from suit. *See e.g., Sparks II*, 859 F.2d at 434; *Simons v. Bellinger*, 643 F.2d 774, 785 (D.C. Cir. 1980); *Kissell v. Breskow*, 579 F. 2d 425, 430 (7th Cir. 1978); *Ginger v. Circuit Court for Wayne County*, 372 F.2d 621, 625 (6th Cir. 1967); *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966). Petitioners have not identified a single decision holding to the contrary.

Petitioners instead assert that the court of appeals failed to make a "factual determination" whether the Bar Defendants' activities in acting upon the complaints filed against petitioners were "investigatory or prosecutional [sic]" in nature and, thus, "sufficiently associated" with the judicial phase of the proceedings. Petition at 46. Even assuming *arguendo* that such "error" would present a basis for review by this Court, petitioners' contention is false. The court of appeals considered the nature of the complained of activities, *i.e.*, the Investigative Hearings conducted by the Grievance Committee, and their role in the attorney discipline scheme established under the Supreme Court Rules. *See* Pet. App. at A2-A3. The court concluded that in undertaking those activities, the Bar Defendants were acting as "designees" of the Supreme

Court of Ohio and were performing a judicial function at the behest of that court. *See* Pet. App. at A6.

That determination was absolutely correct. The Investigative Hearings on the grievances filed against petitioners were conducted under the authority of the Supreme Court of Ohio to discipline the attorneys it licenses. Ohio Const. art. IV, § 2(B)(1)(g). Indeed, the Bar Defendants' actions were compelled by the Supreme Court Rules. Having been presented with the grievances, the Grievance Committee was required to determine whether there was evidence establishing probable cause sufficient for the filing of a formal complaint that the Grievance Committee would prosecute as Relator. Supreme Court Rules V(5)(a), V(6)(c) and V(11). *See*, *supra*, p. 4 at n. 3 and pp. 4-5 at n. 4. The hearings thus represented the first stage of judicial proceedings mandated by the Supreme Court of Ohio, wherein the committee members "were acting in substantially the same capacity and making essentially the same decision, as a Magistrate in a preliminary hearing, i.e., determining whether probable cause had been shown that a violation had been committed." *Simons*, 643 F.2d at 793 (MacKinnon, J., concurring).

There is, in short, no reason for review of the court of appeals' determination that the Bar Defendants are entitled to absolute immunity for their actions in conformance with the Supreme Court Rules. Petitioners are unable to point to a single decision rendered by this

or any other court which is in conflict with that holding.[7] Nor does the record suggest any grounds for exercise of the Court's supervisory powers with respect to that decision.

Petitioners also challenge the court of appeals' holding that their federal antitrust claim against the Bar Defendants is barred under the doctrine of state action immunity first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). *See* Pet. App. at A6-A7. The applicability of the state action doctrine in the context of state licensing and disciplining of attorneys has been clearly established. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Hefner v. Alexander*, 779 F.2d 277 (5th Cir. 1985). As the court of appeals concluded, the disciplinary proceedings against petitioners "plainly" represented an exercise of the State's sovereign power. *See* Pet. App. at A7. Thus, the immunity enjoyed by the Supreme Court of Ohio under the state action doctrine extended to the Bar Defendants in their role as agents of the court in the disciplinary enforcement scheme. *See Bates*, 433 U.S. at 360.

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[7] Petitioners rely on this Court's decisions in *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutor absolutely immune for initiating prosecution), and *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1940 (1991) (prosecutor entitled to absolute immunity for conduct at probable cause hearing), for the proposition that absolute immunity is applicable only to those activities "intimately associated" with judicial proceedings. Petitioners do not explain how the Bar Defendants' actions in conducting the Investigative Hearings, thereby initiating the prosecution of the disciplinary charges against petitioners, are in any way distinguishable from the conduct at issue in *Imbler* and *Burns*.

Petitioners' argument that the Supreme Court of Ohio lacked the "sovereign authority" to discipline petitioners for violations of the Code and the Supreme Court Rules is frivolous, particularly in light of this Court's refusal to review the disciplinary judgment entered against petitioners.[8] The authority of the Ohio Supreme Court to promulgate and enforce the Code and the Supreme Court Rules and to delegate prosecutorial functions to local bar committees is indisputable. *See* Ohio Const., art. IV, § 2(B)(1)(g). Nothing in the Petition or the record of this case recommends that this or any other issue raised by petitioners merits the Court's attention.

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[8] Petitioners' allegation that the disciplinary proceedings against them involved determination of "what constitutes a reasonable attorney's fee in a federal court fee-shifting proceeding", Petition at 47-48, is demonstrably false. In fact, petitioners' own recitation of the facts reveals that a fee-shifting award was never entered in Gurish's civil rights case and that their dispute with Gurish involved the proper division of a settlement fund under the terms of their fee arrangement with Gurish. *See* Petition at 5-8.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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April 30, 1993

APPENDIX

Ohio Const., Art. IV, § 2

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted,

and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from

invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)

RULE V OF THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

Disciplinary Procedure. Pursuant to the powers of the Supreme Court over the Bar of this state and the members thereof, this rule is amended, as follows, effective on January 1, 1988, except Sections (1)(b), (3)(b), (3)(c)(i), (3)(c)(ii), and (3)(d) which shall be effective September 1, 1987, and shall apply to all pending cases.

(1)(a) *Creation of Board of Commissioners on Grievances and Discipline of the Supreme Court (hereinafter called Board of Commissioners or Board).*

There is hereby created a Board of Commissioners on Grievances and Discipline of the Supreme Court. The Board of Commissioners shall consist of twenty-eight (28) persons: seventeen (17) members of the Bar of the Supreme Court, seven (7) active or voluntarily retired judges of the State of Ohio, or judges retired by reason of age pursuant to Article IV, Section 6 of the Constitution of the State of Ohio, and four (4) nonlawyer members. The lawyer members of such Board shall be appointed from Ohio Appellate Districts as follows: District One (1), two (2) members; District Two (2), one (1) member; District Three (3), one (1) member; District Four (4), one (1) member; District Five (5), one (1) member; District Six (6), two (2) members; District Seven (7), one (1) member; District Eight (8), three (3) members; District Nine (9), one (1) member, District Ten (10), two (2) members; District Eleven (11), one (1) member; and District Twelve (12), one (1) member. Initial appointments under this rule shall be made as follows:

one (1) member shall be appointed from each of Districts One (1), Three (3), Six (6), Eight (8), Nine (9) and Eleven (11) for terms ending December 31, 1988; one (1) member shall be appointed from each of Districts One (1), Four (4), Six (6), Eight (8), Ten (10) and Twelve (12) for terms ending December 31, 1989 and one (1) member shall be appointed from each of Districts Two (2), Five (5), Seven (7), Eight (8) and Ten (10) for terms ending December 31, 1990. The active and retired judge members shall be members at large appointed from separate districts of the State of Ohio. The nonlawyer members of the Board shall be members at large appointed from separate districts of the State of Ohio. One (1) nonlawyer and two (2) judge members shall be appointed for terms ending December 31, 1988, one (1) nonlawyer and two (2) judge members shall be appointed for terms ending December 31, 1989 and two (2) nonlawyer and three (3) judge members shall be appointed for terms ending December 31, 1990. Thereafter, the term of office of each member of the Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided this his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. The Chief Justice and Justices of the Supreme Court each shall appoint two (2) lawyer and one (1) judge member of the Board, each justice acting in order of seniority on the Supreme Court. Three (3) lawyer and four (4) nonlawyer

members shall be appointed by a majority vote of the Supreme Court.

Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled for the unexpired term by appointment by the Justice who appointed the person causing the vacancy, or the successor of that Justice. A person appointed to a term of fewer than three years may be reappointed to not more than two three-year terms. Otherwise, no person may be appointed to more than two three-year terms on the Board.

The Board shall each year elect a judge or attorney member as Chairman. The Chairman and Secretary shall each have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof. The Chairman shall serve in that capacity for no longer than a total of two (2) years.

The Board of Commissioners shall meet in Columbus at least six (6) times each year. The Chairman or the Secretary of the Board may call additional meetings of the Board when necessary.

(b) The terms of members of the Board of Commissioners on Grievances and Discipline of the Bar terminate on December 31, 1987. Members shall complete reports on completed hearings and file them with the Board prior to that date. On January 1, 1988, all proceedings that were pending before the Board of Commissioners on Grievances and Discipline of the Bar on December 31, 1987, are hereby transferred to the

Board of Commissioners on Grievances and Discipline of the Supreme Court.

(c) No member or employee of the Board of Commissioners on Grievances and Discipline of the Supreme Court, Disciplinary Counsel, or employee of the Office of Disciplinary Counsel, shall, while serving as a Commissioner, Disciplinary Counsel, or employee, make any contribution to, or for the benefit of, or take part in the campaign of, or campaign for or against, any judge, Justice, or judicial candidate in this state. This section does not prohibit a Board member who is a candidate for a judicial office or for reelection to a judicial office from making a contribution to, or for the benefit of, or taking part in his own campaign.

(2) **Jurisdiction of the Board.** The Board of Commissioners is empowered and charged to:

(a) receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to the Supreme Court as hereinafter provided:

(i) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by a judge, an attorney and counselor at law, person under suspension from the practice of law, or on probation, or

(ii) concerning the mental illness of any judge or attorney and counselor at law, or

(iii) relating to petitions for reinstatement as an attorney and counselor at law in this state, or

(iv) upon reference by the Supreme Court of conduct by a judge or an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of the Supreme Court or a breach of these rules but did not take place in the presence of the Supreme Court or a member thereof, whether by willful disobedience of any order or judgment of the Supreme Court or the Board of Commissioners, by interference with any officer of the Supreme Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of the Supreme Court to impose punishment with reference either to contempts or breaches of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(b) The Board of Commissioners may issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions regarding the application of these rules, the Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office, in response to any inquiry directed to the Board.

The Board shall adopt, subject to the approval of the Supreme Court, appropriate rules of procedure for the issuance of opinions under this rule.

(3) **Secretary; Disciplinary Counsel; Administration.**

(a) *Secretary.* There is hereby created the position of Secretary which shall be a full-time position. The Secretary shall be an attorney at law duly admitted to practice in the State of Ohio. The Secretary shall be appointed by a majority of the Board of Commissioners and shall serve at the pleasure of the Board. The Secretary shall have the overall scheduling, administrative and fiscal responsibility of the Board of Commissioners. The Secretary shall schedule all hearings for the Board and panels thereof; execute journal entries for extensions of time where appropriate; maintain the records of the receipt and expenditure of money; prepare financial reports and budgets as required by these rules, the Rules for the Government of the Judiciary and when requested by the Board of Commissioners; assist the Board in preparing opinion letters pursuant to Section (2)(b) of this rule; take all necessary steps to see that office facilities, furnishings, stationery, equipment and office supplies are available as needed; and any and all other action appropriate and consistent with his position as chief administrative and fiscal office and not otherwise inconsistent with these rules and the Rules for the Government of the Judiciary. The Secretary shall employ such personnel as are reasonably needed to discharge the responsibilities set forth above and shall establish the salaries of such personnel, subject to approval by the Board of Commissioners. Such Secretary and staff shall not otherwise be employed by any court. The Secretary shall file annually with the Supreme Court a report of the activities and expenses of the Board.

(b) *Disciplinary Counsel.* There is hereby created the position of Disciplinary Counsel, who shall be appointed by a majority vote of the Board of Commissioners, with the approval of the Supreme Court.

The Disciplinary Counsel shall be appointed for a term of four (4) years and shall be removed only for cause. Removal for cause shall be instituted by the filing of a written complaint by the Chairman, acting by authority of a majority of the Board of Commissioners, with the Chief Justice of the Supreme Court, who shall, upon receipt of such complaint, cause the same to be served upon the Disciplinary Counsel for response. Thereafter, the Chief Justice shall schedule a hearing before the Supreme Court, which shall conduct a hearing to determine whether there is sufficient cause for the removal of Disciplinary Counsel.

Assistant Disciplinary Counsel and staff in the Office of Disciplinary Counsel shall serve at the pleasure of the Disciplinary Counsel. Disciplinary Counsel may appoint such assistants as necessary who shall be attorneys at law admitted to practice in this state and who shall not engage in the private practice of law while serving in that capacity.

The Disciplinary Counsel shall appoint staff personnel as required to satisfactorily complete investigation of matters referred to him pursuant to these rules or filed with him pursuant to Rule II or Rule III of the Supreme Court Rules for the Government of the Judiciary. The compensation of the Disciplinary Counsel shall be fixed by the Supreme Court. The compensation of personnel employed by the Disciplinary Counsel,

including any Assistant Disciplinary Counsel, shall be fixed by Disciplinary Counsel, with the approval of the Supreme Court. The Supreme Court shall provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel. Disciplinary Counsel shall file annually with the Supreme Court and the Board a report of the activities and expenses of his office.

(c) (i) Funding. Funds for the operation of the Board and offices created under this rule shall be provided from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

(ii) Budgets. The Board and Disciplinary Counsel shall file with the Supreme Court on or before November 1 of each year, a proposed budget for the calendar year beginning the next January 1, for approval by the Supreme Court. Such reports and budget shall become a part of the public records of the Supreme Court.

(d) *Public Records.* Except as provided in Section 23 of this rule and by state and federal law, documents, investigations of complaints made under these rules, and records of the Board of Commissioners, the Secretary, and the Disciplinary Counsel, including records of income and expenditures, shall be made available for inspection to any member of the general public at reasonable times during regular business hours. Upon request, a person responsible for such records shall make copies available at cost, within a reasonable period of time, and such records shall be maintained in such a

manner that they can be made available for inspection in accordance with this rule.

(4) **Referral for Investigation.** The Board of Commissioners may refer to a Certified Grievance Committee or to Disciplinary Counsel any matters filed with it for investigation, as hereinafter provided.

In the event that a Certified Grievance Committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the Certified Grievance Committee may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.

(5)(a) *Application of Rule; Authority and Duty of Bar Committees and Disciplinary Counsel.* From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by Justices, judges and by attorneys and counselors at law; all proceedings for the discipline of such Justices, judges and attorneys and counselors at law, persons under suspension, probation or disbarred from the practice of law; and all proceedings for the reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any Certified Grievance Committee shall investigate any matter filed with it and may cause a complaint to be filed pursuant to this rule in cases where it finds probable

cause to believe that misconduct has occurred or that a condition of mental illness exists.

The investigation of complaints with regard to mental illness and complaints and grievances involving alleged misconduct by Justices, judges and attorneys and counselors at law shall be conducted by the Special Investigator, Disciplinary Counsel or a Certified Grievance Committee. A Certified Grievance Committee sponsored by one or more bar associations, or a bar association may provide, by its constitution, regulations, or rules, for the appointment of lay persons as members of a grievance committee, provided that the majority of such committee shall consist of attorneys at law admitted to the practice of law by the Supreme Court.

The investigation of complaints by Disciplinary Counsel or a Certified Grievance Committee shall be concluded within sixty (60) days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within thirty (30) days thereafter. Extensions of time for completion of the investigation may be granted upon written request, and for good cause shown, by the Secretary of the Board of Commissioners. If the investigation is not completed within sixty (60) days from the date of filing the complaint and no written request has been made for an extension of time, the Secretary shall refer the matter either to Disciplinary Counsel or to a geographically appropriate Certified Grievance Committee. No extension of time shall be granted beyond one-hundred-fifty (150) days from the date of receipt of the complaint. If an extension of time has been granted, and an investigation by a Certified Grievance Committee or Disciplinary Counsel is not

completed within one-hundred-fifty (150) days from the date of filing the complaint, the Secretary shall then refer the matter either to a geographically appropriate Certified Grievance Committee or to Disciplinary Counsel, and the investigation shall be completed within an additional sixty (60) days.

The Chairman and Secretary of the Board may extend time limits in the event of pending litigation, appeals, unusually complex investigations, or time delays in obtaining evidence or testimony of witnesses, or for other good cause shown.

Time limits set forth in this rule are not jurisdictional and no complaint filed shall be dismissed unless it appears that there has been an unreasonable amount of delay and that the respondent's rights to have a fair hearing have been violated.

No investigation conducted by Disciplinary Counsel or a Certified Grievance Committee shall be completed, and no formal complaint shall be filed with the Board, without first giving the judge or attorney who is the subject of the complaint or investigation notice of each allegation and the opportunity to respond to each allegation.

If a Certified Grievance Committee or Disciplinary Counsel determines upon investigation of a complaint that the filing of a formal complaint with the Board of Commissioners is not warranted, the Complainant shall be notified in writing of that determination.

Each Certified Grievance Committee and Disciplinary Counsel shall file quarterly, by the fifteenth day of January, April, July, and October of each year, with the Board of Commissioners a report of the number of complaints made to the committee or to Disciplinary Counsel during the preceding quarter. The report shall specify the types of complaints filed, including commingling of funds, conviction of crime, failure to file income tax returns, failure to protect the interest of a client, soliciting, embezzlement, conversion, failure to account, excessive fees, mental illness and any other type of complaint not herein set forth. The report shall indicate the number of complaints filed, the number pending in each category and the number terminated by action of the committee or Disciplinary Counsel during the reporting period.

The name of the Chairman of the Certified Grievance Committee shall be reported in writing annually to the Board of Commissioners and to Disciplinary Counsel by the President of each bar association having a Certified Grievance Committee.

The Board of Commissioners, Disciplinary Counsel, and the President, Secretary or Chairman of a Certified Grievance Committee of any regularly organized bar association in the state may call upon any Justice, judge or attorney and counselor at law in the state to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such Justice, judge or attorney and counselor at law shall

neglect or refuse so to assist in any such investigation or so to testify.

In the event that a Certified Grievance Committee or Disciplinary Counsel shall in the case of a disciplinary investigation as provided for in this rule seek determination of a procedural question, the President of a bar association with a Certified Grievance Committee or the Chairman of its Certified Grievance Committee or Disciplinary Counsel shall direct a written inquiry to the Chairman of the Board of Commissioners by filing it with the Secretary of the Board. Upon receipt of such written inquiry, the Chairman of the Board of Commissioners may refer the inquiry to a panel of three (3) members of the Board. The three-member panel shall be selected by the Secretary of the Board of Commissioners by lot. The written inquiry shall be documented with such facts, citations, statutory references and other written data that may be of assistance to make a determination of the matter presented. After the panel has completed its study of the problem presented, the panel shall make a written recommendation as to solution of the question. Upon receipt of such report and recommendation, the Chairman of the Board of Commissioners shall promptly convene the members of the Board who shall approve, reject, modify or otherwise dispose of the panel's recommendation. In the event that the question presented requires immediate attention for decision, the Chairman of the Board has the discretionary power to waive reference of the question to a panel, but shall submit the question or questions presented to the entire Board for its decision.

Grievance Committees certified under these rules may be reimbursed from the funds created by the registration fees collected, pursuant to Rule VI, for direct expenses incurred by such Certified Grievance Committees in performing the obligations imposed on them by these rules, which shall be limited to costs for depositions, transcripts, copies of documents, necessary travel expenses, and compensation of investigators authorized by the Board. There shall be no reimbursement for the cost of the time of other bar association personnel or attorneys in discharging these obligations. Reimbursement shall be made upon submission to the Secretary of the Board of Commissioners of proof of expenditures for the aforesaid purpose.

(b) *Cooperation with Board of Commissioners of the Clients' Security Fund.*

(i) Upon the receipt of any complaint which presents facts which may be the basis for an award from the Clients' Security Fund under Rule VIII of these rules, Disciplinary Counsel or any Certified Grievance Committee authorized to investigate complaints under this rule shall notify the Complainant of his potential right to an award from the fund and provide him with the forms necessary to initiate a claim with the Clients' Security Fund.

(ii) Disciplinary Counsel, any Certified Grievance Committee authorized to investigate complaints under this rule and the Board shall provide the Board of Commissioners of the

Clients' Security Fund with findings from investigations, complaints or any other records it requests in connection with an investigation under Rule VIII; provided however that the transmittal of confidential information may be delayed pending the termination of the disciplinary investigation or proceedings.

(6) **Definitions.**

(a) *Misconduct.* Misconduct shall mean any violation by a Justice, judge or an attorney of any provision of the oath of office taken upon admission to the practice of law in this state or any violation of the Code of Professional Responsibility or the Code of Judicial Conduct as adopted by the Supreme Court from time to time, disobedience of these rules or of the terms of an order imposing probation or a suspension from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) *Mental Illness.* Mental illness shall mean the condition defined in R.C. 5122.01(A).

(c) *Certified Grievance Committee.* A Certified Grievance Committee shall be a duly constituted and organized committee of the Ohio State Bar Association or of one or more local bar associations of the State of Ohio, which association permits the membership of any attorney practicing within the geographic area intended to be served by that association without reference to the attorney's area of practice, special interest or other criteria. It shall be certified by the Board of Commissioners to be responsible for the investigation of

allegations of misconduct by judges or attorneys and mental illness affecting judges or attorneys and the initiation of complaints as a result thereof under the provisions of these rules upon designation by the bar association(s) and satisfaction of the following minimum standards:

(i) It maintains a full-time permanent office which is open during regular business hours and has a listed telephone.

(ii) It has a minimum of one (1) full-time staff person to process complaints received by the Grievance Committee.

(iii) The Grievance Committee itself consists of not less than fifteen (15) persons, and the committee meets at lest once every other month.

(iv) The Committee maintains permanent files and records of proceedings, and it is sufficiently funded by the sponsoring bar association(s) to perform the duties imposed upon it by these rules.

(v) The Grievance Committee procedures for the processing of grievances shall conform to standard rules promulgated by the Board of Commissioners.

(vi) The Grievance Committee shall file the report set forth in paragraph (5)(a) of this rule.

(d) *Probable Cause.* Probable cause shall mean that there is available substantial credible evidence that misconduct has been committed.

(7) **Manner of Discipline.** Any Justice, judge or attorney found guilty of misconduct shall be disciplined as follows:

(a) a permanent disbarment from the practice of law, or,

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,

(c) suspension for a period of six (6) months to two (2) years from the practice of law, which suspension may be stayed in whole or in part, or,

(d) probation for such period of time and upon such conditions as the Supreme Court determines, but only in conjunction with a suspension ordered pursuant to Section 7(c) of this Rule, or

(e) a public reprimand.

(8) **Effect of Discipline; Enhancement.** (A) A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. Prior disciplinary offenses shall be considered as a factor that may justify an increase in the degree of discipline to be imposed for subsequent misconduct.

(9) **Indefinite Suspension from the Practice of Law for Conviction of a Felony.**

(a) Any Justice, judge or attorney admitted to the practice of law in the State of Ohio who is convicted in this state of a felony, or who is convicted of an equivalent offense under the laws of any other jurisdiction, shall be subject to an indefinite suspension.

(i) A certified copy of the judgment entry of conviction of a Justice, judge or an attorney of an offense defined in this rule shall be transmitted forthwith by the judge entering such judgment to the Secretary of the Board of Commissioners. A certified copy thereof shall also be transmitted forthwith to Disciplinary Counsel or the President, Secretary or Chairman of each Certified Grievance Committee.

(ii) Upon receipt from any source of a certified copy of the judgment entry of conviction by the Secretary of the Board of Commissioners, the Secretary shall promptly cause such entry to be submitted to the Supreme Court, whether the conviction resulted from a plea of guilty or a plea of nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(iii) The Supreme Court may enter such order as it deems appropriate, including an order immediately and indefinitely suspending the Justice, judge or attorney from the practice of law.

(b) A certified copy of a judgment entry of conviction of an offense shall be conclusive evidence of the commission of that offense in any disciplinary proceedings instituted against a Justice, judge or an attorney based upon the conviction.

(c) Any disciplinary proceeding instituted against a Justice, judge or an attorney based upon a conviction of an offense shall not be brought to hearing until all appeals from the conviction are concluded.

(d) A Justice, judge or an attorney suspended under the provisions of this rule or Rule II of the Supreme Court Rules for the Government of the Judiciary shall be reinstated by the Supreme Court upon the filing with the Secretary of the Board of Commissioners of a certified copy of a judgment reversing the conviction of the crime. Such reinstatement shall not terminate any disciplinary proceeding then pending.

(e) *Duty of Clerk on Entering Order.* Upon the entry of an order indefinitely suspending a Justice, judge or an attorney for conviction of an offense, the Clerk of the Supreme Court shall mail certified copies thereof as provided in Section (22) of these rules.

(10) Probable Cause Panel; Creation; Duties; Request for Review.

(a) *Creation.* There is hereby created one or more probable cause panels, each composed of three (3) members of the Board, chosen by the Chairman of the Board, who shall designate one lawyer or judge member as Chairman.

(b) *Duties.* Probable cause panel shall review each investigation in which Disciplinary Counsel or a Certified Grievance Committee has determined that probable cause exists to file a formal complaint resulting from a person's alleged misconduct, other than an alleged violation of the terms of probation.

(i) Upon making a preliminary determination that probable cause exists for the filing of a formal complaint, Disciplinary Counsel or a Certified Grievance Committee shall forward to the Secretary a summary of the investigation together with a copy of the formal complaint. The Secretary shall refer the matter to a probable cause panel for review. The probable cause panel shall review the investigation and make an independent determination of whether probable cause exists for the filing of a formal complaint. The panel shall then issue an order certifying the formal complaint to the Board or dismissing the complaint and investigation. The panel's determination shall be sent to Disciplinary Counsel, to the appropriate Certified Grievance Committee, and to the Respondent by certified mail.

(ii) Within seven (7) days of receipt of the panel's decision to dismiss the complaint, Disciplinary Counsel or a Certified Grievance Committee may appeal the decision to the full Board by filing an appeal in writing with the Secretary of the Board. In such a case, the Board shall review the investigation and make an independent determination as to whether probable

cause exists for the filing of a formal complaint. The Board shall then issue an order certifying the formal complaint or dismissing it, and shall send a copy of its decision to the parties by certified mail. There shall be no appeal from such decision.

(c) *Request for Review.* A person making allegations under these Rules, who is dissatisfied with a determination by a Certified Grievance Committee not to file further proceedings, may secure a review of such determination by filing a written request with the Secretary of the Board within fourteen (14) days after the Complainant is notified of the determination. The Secretary shall thereupon refer a request for review of a determination made by a Certified Grievance Committee to Disciplinary Counsel. The review shall be promptly considered by Disciplinary Counsel and a decision made upon such review within thirty (30) days and the Complainant thereupon notified. Extensions of time for completion of the review may be granted, for good cause shown, by the Secretary. No further review or appeal by a Complainant shall be authorized. If the original determination is not affirmed, any further proceedings shall be handled by the entity conducting the review.

(11) **The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Certified Grievance Committee shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing, who shall be counsel for the Relator,

and supported by a certificate in writing signed by the President, Secretary or Chairman of the Certified Grievance Committee, which Certified Grievance Committee shall be deemed the Realtor, certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. It shall constitute the authorization of such counsel to represent said Realtor in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by the Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

Upon the filing of a complaint with the Secretary of the Board, Relator shall forward a copy thereof to Disciplinary Counsel, to the Certified Grievance Committee of the Ohio State Bar Association, to the local bar association and to any Certified Grievance Committee serving the county or counties in which the Respondent resides and maintains his office and for the county from which the complaint arose.

(12) Duty of the Board Upon Filing of the Complaint.

(a) *Notice to Respondent*. The Secretary of the Board of Commissioners shall send a copy of the Complaint by certified mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and

to serve copies thereof upon counsel of record named in the complaint. Extensions of the time for the filing of the answer may be granted, for good cause shown, by the Secretary of the Board of Commissioners.

(b) *Mental Illness Suspension.* After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) hereof, the Board shall forthwith certify the complaint to the Supreme Court and the Supreme Court may suspend the Respondent from the practice of law.

(c) *Examination.* If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(d) *Duty of Clerk on Entering Order.* Upon the entry of an order suspending Respondent for mental illness, the Clerk of the Supreme Court shall mail certified copies thereof as provided in the first paragraph of Section (22)(a) and shall change the registration of Respondent to inactive status. No publication of such order shall be made but the order shall be a matter of public record.

(e) *Termination.* Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Supreme Court.

(13) Hearing by Panel of Three Commissioners; Motion for Default.

(a) After Respondent's answer has been filed, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Secretary by lot who shall designate one (1) lawyer or judge member of such panel as Chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated, and no one of whom shall have been a member of the probable cause panel which reviewed the matter pursuant to Section (10)(b) of this rule. Not more than one (1) public member shall serve on any hearing panel. A majority of such panel shall constitute a quorum for all purposes. Requests for continuance may be granted by the Chairman of the panel for good cause shown.

(b) If no answer has been filed within twenty (20) days of the answer date set forth in the notice to Respondent of the filing of the complaint, or any extension thereto, the Relator shall make reasonable efforts to contact the Respondent.

A motion for default shall contain at least the following:

(I) A statement of the effort made to contact the Respondent and the result;

(II) Sworn or certified documentary prima facie evidence in support of the allegations made;

(III) Relator's recommendation for sanction;

(IV) A statement of any mitigating factors of which Relator is aware; and

(V) A certificate of service of the motion on Respondent at the address shown for Respondent on the records of the Supreme Court and at the last address known to Relator, if different.

A hearing panel may grant a motion for default by unanimous agreement only. If a motion is granted, the panel shall make its certified report for review by the Board, pursuant to Section (16) of this rule. If a motion is denied, the panel shall proceed with a formal hearing, pursuant to subsection (A) of this section. The Chairman of the Board may set aside a default entry, for good cause shown, and order a panel hearing at any time before the Board's report and recommendation are certified to the Supreme Court.

(14) **Authority of Panel; Dismissal.** If the panel finds that the complaint or evidence is insufficient to support a charge of misconduct the panel may order that the complaint be dismissed. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, Disciplinary Counsel, the Certified Grievance Committee for and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose, and the Ohio State Bar Association.

(15) **Referral by Panel.** In the alternative, if the panel determines that findings of fact and recommendations for dismissal should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal in the same manner as provided in the following sections of this Rule V with respect to public reprimand, probation, suspension or disbarment.

(16) **Public Reprimand, Probation, Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines by clear and convincing evidence that Respondent is guilty of misconduct and that public reprimand, suspension for a period of six (6) months to two (2) years, probation, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and any recommendations as to probation and the terms thereof, and shall file the same, together with the

transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board.

(17) **Review by Entire Board.** Upon review, the Board may refer the matter back to the panel for further hearing or may order a further hearing to be presented before the Board or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board may dismiss the complaint or find that the Respondent is guilty of misconduct. If the complaint is dismissed, such action shall be reported to the Secretary of the Board, who shall notify the same persons and organizations that would have received notice fit he complaint had been dismissed by the panel that heard the matter.

(18) **Public Reprimand; Probation, Suspension or Permanent Disbarment; Duty of Board after Review.** If the Board determines that a public reprimand, suspension for a period of six (6) months to two (2) years, suspension for an indefinite period from the practice of law, permanent disbarment or probation is merited, the Board shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of the Supreme Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact

and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(19) Show Cause Order Issued by the Supreme Court to Respondent. On the filing of such final report of the Board, the Supreme Court shall issue to the Respondent an order to show cause why the report of the Board shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of the Supreme Court on the Respondent and all counsel of record, personally or by certified mail.

(20) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereon on the Secretary of the Board and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of the Supreme Court for original actions.

(21) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by the rules of the Supreme Court for original actions.

(22) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order; Duties of Disqualified or Resigned Attorney.

(a) After hearing on objections, or, if objections are not filed within the prescribed time, the Supreme Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board or panels. An order imposing a suspension for an indefinite period or for a period of six (6) months to two (2) years may allow full or partial credit for any period of suspension imposed under Section (9) of this rule. Upon the entry of any disciplinary order pursuant to this rule, or acceptance of a resignation from the practice of law, the Clerk of the Supreme Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Disciplinary Counsel, to the Certified Grievance Committee for and the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint arose, to the Ohio State Bar Association, to the Administrative Judge of the Court of Common Pleas for each such county or counties, and to the Presiding Judges of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit and to the Supreme Court of the United States.

If a disciplinary order of the Supreme Court provides for a disbarment, suspension, public reprimand, probation, or acceptance of a resignation from the practice of law, the Clerk of the Supreme Court shall

arrange for publication thereof in the official reports of the Supreme Court, in the Ohio State Bar Association Report of the Ohio State Bar Association and in a publication, if any, of the local bar association. Such publication shall include a citation of the case in which the disciplinary order was issued.

If any attorney resigns from the practice of law, the Clerk of the Supreme Court shall arrange for publication of the order of the Supreme Court in the Ohio State Bar Association Report of the Ohio State Bar Association, in a publication, if any, of the local bar association, and by the publisher of the official reports of the Supreme Court.

(b) The Supreme Court shall include in its order disbarring or suspending, for mental illness or disciplinary reasons, an attorney, or in any order pertaining to the resignation of an attorney, a time limit not to exceed thirty (30) days, within which the disqualified attorney shall:

(i) Notify all clients being represented in pending matters and any co-counsel of his disbarment, suspension or resignation and his consequent disqualification to act as an attorney after the effective date of such order, and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

(ii) Regardless of any fees or expenses due the attorney, deliver to all clients being represented in pending matters any papers or other

property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

(iii) Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in his possession or control;

(iv) Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification or resignation to act as an attorney after the effective date of such disqualification order, and file a notice of disqualification of counsel with the Supreme Court or agency before which the litigation is pending for inclusion in the respective file or files;

(v) All notices required by such an order of the Supreme Court shall be by certified mail and shall contain a return address where communications may thereafter be directed to the disqualified attorney;

(vi) Within the time limit prescribed by the Supreme Court the disqualified attorney shall file with the Clerk of the Supreme Court and the Disciplinary Counsel an affidavit showing compliance with the order entered pursuant to this rule and proof of service of notices required by said order. Such affidavit shall also set forth the address where the affiant may receive

communications, and said offices shall be kept advised of any later change in address by the disqualified attorney;

(vii) A disqualified attorney shall retain and maintain a record of the various steps taken by him pursuant to the order entered by the Supreme Court so that, upon any subsequent proceeding instituted by or against him, proof of compliance with the order will be available for receipt in evidence.

(c) Whenever an attorney is suspended for mental illness, cannot be found in the jurisdiction for a period of sixty (60) days or more, dies, refuses to meet or work with a significant number of clients for a period of sixty (60) days or more, or fails to comply with paragraph (b) of this section, and no partner, executor or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility the Disciplinary Counsel or Chairman of a Certified Grievance Committee may appoint an attorney or attorneys to inventory to files of such attorney and to take such action, including action set forth in paragraph (b) herein, as is necessary to protect the interest of clients of such attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to such appointed attorney or attorneys from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar. An attorney so appointed shall not, except as necessary to carry out the order of appointment by the Disciplinary Counsel or Chairman of a Certified Grievance Committee may appoint an attorney or attorneys to inventory the files

of such attorney and to take such action, including action set forth in paragraph (b) herein, as is necessary to protect the interest of clients of such attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to such appointed attorney or attorneys from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar. An attorney so appointed by the Disciplinary Counsel or Chairman of a Certified Grievance Committee, disclose any information contained in files so inventoried without the written consent of the client to whom such files relate. Such attorney may not represent that client.

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(31) **Manner of Service.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Complainant, Relator, Respondent, Petitioner, or other party, in connection with any proceeding under these rules, service may be made upon counsel of record for such Complainant, Relator, Respondent, Petitioner, or other party, either personally or by certified mail.

(32) **Quorum of Panel or Board.** A majority of the members of the Board of Commissioners, or a panel thereof, shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or a panel thereof; except for the granting of a motion for default pursuant to Section (13)(B) of this rule, which shall require the unanimous action of a hearing panel.

(33) Clerk is Agent for Service of Notices on Nonresident Justice, Judge or Attorney. Any nonresident of this state, having been admitted as an attorney and counselor at law by the rules of the Supreme Court, or any resident of this state, having been admitted as an attorney and counselor at law by the rules of the Supreme Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this state makes the Clerk of the Supreme Court his agent for the service of any notice provided for in any proceeding instituted against such Justice, judge, or attorney and counsel at law, pursuant to this rule.

(34) Manner of Service on Clerk; Record of Such Service a Public Record. All such notices shall be served by the Secretary of the Board upon the Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by certified mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service, upon said Clerk of the Supreme Court, addressed to such Respondent at his last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of the Supreme Court shall keep a record of the day and hour of service upon him of such notice and any accompanying document, which shall be a public record in the office of said Clerk.

(35) **Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by Disciplinary Counsel, the President, Secretary, or Chairman of a Certified Grievance Committee authorized to sign a certificate under Section (11) hereof, the Special Investigator, or the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Special Investigator, Disciplinary Counsel, a Certified Grievance Committee or a hearing panel of the Board of Commissioners. All such subpoenas shall be signed by a member of the Board or its Secretary and served as provided by statute.

(36) **May Order Depositions.** The Secretary of the Board may order testimony of a witness to be taken by deposition within or without this state in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(37) **Discovery Limited.** For sixty (60) days following the filing of an answer in formal proceedings, both Relator and Respondent shall be afforded reciprocal discovery of all matters not privileged.

Disputes concerning the scope and other aspects of discovery shall be determined by the Chairman of the hearing panel before which the matter is pending. All discovery orders by the Chairman are interlocutory and may not be appealed prior to the entry of the final order.

(38) **Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to obey a

subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of the Supreme Court and shall be punishable accordingly.

(39) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(40) Docket of Complaints. The Secretary of the Board shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the record of his office.

(41) Board May Prescribe Rules. The Board may, subject to the prior approval of the Supreme Court, adopt other rules and regulations not inconsistent herewith.

(42) Rule to be Liberally Construed. The process and procedure under this rule and other regulations approved by the Supreme Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule and such regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement

shall be liberally construed for the protection of the public, the courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended rule became effective shall continue to apply.

(43) Proceedings Private; Public.

(a) All proceedings and documents relating to review and investigation of complaints made under these Rules shall be private except:

(i) where Respondent shall request in writing that they be public; or

(ii) where Respondent by voluntary act waives privacy of the proceedings.

(b) At the time a formal written complaint is certified by a probable cause panel to the Secretary of the Board, that formal complaint, and all subsequent proceedings in connection therewith, shall be public.

(c) All members of the Board, or of any Certified Grievance Committee, shall be required, prior to taking office, to swear or affirm that they will abide by these rules and further that they will protect the privacy of the proceedings and documents relating thereto.